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IN THE FIRST COURT OF APPEALS
HOUSTON, TEXAS

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CHRISTOPHER A. PRINE
Clerk

University of Houston System,
Defendant-Appellant
vs.
Jim Olive Photography, D/B/A Photolive, Inc.,
Plaintiff-Appellee

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Appeal from the 295th District Court, Harris County, Texas

Trial Court Cause No. 2017-84942; Hon. Caroline E. Baker, Presiding

**AMICUS BRIEF OF THE NATIONAL PRESS PHOTOGRAPHERS
ASSOCIATION, THE AMERICAN SOCIETY OF MEDIA
PHOTOGRAPHERS, AND FOUR OTHER VISUAL ARTISTS GROUPS IN
SUPPORT OF PLAINTIFF-APPELLEE**

Thomas Maddrey
State Bar No. 24092740
Maddrey PLLC
901 Main St., Ste. 6530
Dallas, TX 75202
Telephone: (214) 702-9862
tbm@maddreypllc.com

GENERAL COUNSEL
FOR AMICUS AMERICAN
SOCIETY OF MEDIA PHOTOGRAPHERS

Alicia Calzada
State Bar No. 24076296
Alicia Wagner Calzada, PLLC
305 E. Ramsey RD, Ste. 305
San Antonio, TX 78216
Telephone: (210) 825-1449
alicia@calzadalegal.com

DEPUTY GENERAL COUNSEL
FOR AMICUS NATIONAL PRESS
PHOTOGRAPHERS ASSOCIATION

IDENTITIES OF PARTIES AND COUNSEL

Alicia Calzada
Deputy General Counsel
National Press Photographers Association
Alicia Wagner Calzada, PLLC
State Bar No. 24076296
221 W. Poplar St.
San Antonio, TX 78212
Telephone: (210) 825-1449
Alicia@calzadalegal.com

Mickey H. Osterreicher
General Counsel
National Press Photographers Association
120 Hooper Street
Athens, GA 30602
Telephone: (716) 983-7800
lawyer@nppa.org

ATTORNEYS FOR AMICUS NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION

Thomas Maddrey
General Counsel
American Society of Media Photographers
Maddrey PLLC
State Bar No. 24092740
901 Main St., Ste. 6530
Dallas, TX 75202
Telephone: (214) 701-1875
tbm@maddreypllc.com

ATTORNEY FOR AMICUS AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS

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**ISSUES PRESENTED, STATEMENT OF THE CASE, AND
STATEMENT OF FACTS**

Amici adopt the Issues Presented, the Statement of the Case and the Statement of Facts in the Brief of Appellee.

STATEMENT REGARDING ORAL ARGUMENT

Oral Argument has not been granted in this appeal.

STATEMENT OF INTEREST

Pursuant to Texas Rule of Appellate Procedure 11(b) and (c), the brief is being tendered on behalf of the National Press Photographers Association (“NPPA”), the American Society of Media Photographers (“ASMP”), North American Nature Photography Association (“NANPA”), Graphics Artists Guild, Inc. (“GAG”), American Photographic Artists (“APA”) and Professional Photographers of America (“PPA”). NPPA and ASMP paid for the preparation of the brief.

National Press Photographers Association (“NPPA”) is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA’s members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism community. Since its founding in 1946, the NPPA has been the Voice of Visual Journalists, vigorously promoting the constitutional and intellectual property rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism.

American Society of Media Photographers, Inc. (“ASMP”) is a 501(c)(6) non-profit trade association representing members who create and own substantial numbers of copyrighted photographs. These members all envision, design, produce, and sell their photography in the commercial market to entities as varied as multinational corporations to local mom and pop stores, and every group in between.

The North American Nature Photography Association (“NANPA”) is a 501(c)(6) non-profit organization founded in 1994. NANPA promotes responsible nature photography as an artistic medium for the documentation, celebration, and protection of our natural world. NANPA is a critical advocate for the rights of nature photographers on a wide range of issues, from intellectual property to public land access.

Graphic Artists Guild, Inc. (“GAG”) has advocated on behalf of graphic designers, illustrators, animators, cartoonists, comic artists, web designers, and production artists for fifty years. GAG educates graphic artists on best practices through webinars, Guild e-news, resource articles, and meetups. The Graphic Artists Guild Handbook: Pricing & Ethical Guidelines has raised industry standards and provides graphic artists and their clients guidance on best practices and pricing standards.

American Photographic Artists (“APA”) is a not for profit trade association of professional photographers and copyright owners. APA members have a strong interest in the issues presented by this case because their businesses and livelihoods depend upon the broadly defined subject matter that is protected under the Copyright Act.

Professional Photographers of America (“PPA”) is the world’s oldest and largest association representing professional photographers. Founded in 1868, PPA strives to provide its members with the artistic knowledge and entrepreneurial skills

necessary to foster their success in the photographic industry. In addition to providing support to its members, PPA is also dedicated to preserving the intellectual property rights of photographers, videographers, and other visual artists.

TO THE HONORABLE FIRST COURT OF APPEALS:

Amici NPPA, ASMP, NANPA, GAG, APA, and PPA are trade organizations representing photographers, graphic artists, and other visual creators who rely on fair and equitable copyright law and policy. The University's position in this case suggests an absurd outcome that will devastate thousands of photographers as well as over 800,000 creative professionals in the state of Texas—a full 1-in-15 Texans. Even more broadly, the State's arguments would negatively impact the two-trillion-dollar copyright industry in this country.

I. SUMMARY OF THE ARGUMENT

This case presents the court with a single question: will the law support the ability of a public university to steal a copyrighted work, use it for multiple years, then disclaim their theft, and, simultaneously, argue that copyrights have no value as property and therefore are not subject to the Takings Clause? The answer here must be “no.” The district court found, and this court should likewise uphold, that the government must be held accountable when they take, use or damage property that they have not already paid for.

The promotion of the “progress of science and useful arts”¹ as well as the lifeblood of the creative community in the city of Houston, the state of Texas, and the entire country is built around the protection of intellectual property. Creative

¹ See U.S. CONST. ART. I § 8.

professionals, who number in the millions and generate billions for their local economies, would be irreparably harmed by allowing this type of theft to occur without consequence. As *amici* to those in the creative community, we see first-hand how copyright infringement devastates the creative industry, and how deep and pervasive these infringements can be.

In addition to the economic and cultural damage wrought by the behavior of the University, the State in its arguments asserts control over copyright law—a subject entirely within the federal domain. To create what would amount to a free collective licensing arrangement only available to state actors pre-empts federal law and must be disallowed.

Further, there is no requirement that an infringer “know” of the infringement before being culpable for copyright infringement. As recently upheld in federal appellate courts and supported by the clear text of the Copyright Act, all contemporary photographs are presumed to be copyrighted. There is no gray area here; neither law nor jurisprudence allows for it.

The law affords a creator who owns his copyright multiple exclusive rights. The State would argue that removing the effect of some of the rights granted to a copyright holder leaves the remainder available to be asserted, and therefore there is no “taking.” This is a dismissive and devaluing view of copyright, and the Takings Clause which is exactly predicated to prevent state actors from doing what the University did here.

The First Amendment prohibits a state actor from compelling speech, and a photograph has time and again been held as protected First Amendment “speech.”² It is the right of every citizen under the Constitution not to be compelled to promote the interests of an entity it would otherwise choose not to, as is the case here. The State violated Mr. Olive’s First Amendment rights.

Appellee Jim Olive dedicates his life to the art and profession of photography. He creates images precisely for the purpose of licensing them in the marketplace. That is his job. *Amici* support Appellee’s arguments and ask that this court uphold the lower court’s decision.

II. ARGUMENT

This appeal stems from a Plea to the Jurisdiction filed by the University in which the State argued that the University is protected from suit for copyright infringement by sovereign immunity and also cannot be held responsible for copyright infringement through the Takings Clause. The Attorney General’s position against small businesses, that copyrighted works are free for the state to exploit without compensation, is untenable, misconstrues copyright law, misunderstands the nature of the photographic market, and violates the First Amendment.

² *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 938 (6th Cir. 2003); *Bery v. City of New York*, 97 F.3d 689, 696 (2d Cir. 1996).

While the Attorney General discusses this case from the perspective of one photograph, used in several different ways, the State's position threatens the photographic community, if not the entire creative community. Following their argument, the State cannot be held accountable for its unauthorized use of the personal property of Texans and non-Texans alike. Accordingly, the State does not only have the ability to freely use Mr. Olive's aerial photograph, but is also able to make unlimited commercial use of a Salvador Dali painting; make unlimited commercial use of books like J.K. Rowling's Harry Potter series; run a profitable commercial enterprise showing pirated versions of the Avengers: Endgame; and sell bootleg copies of the latest Beyoncé or Bob Dylan album in the school bookstore and online.

Amici support Appellee's argument explaining that copyright is vested personal property subject to constitutional protections under both the Texas and U.S. Constitutions. We reject the notion that the State can unilaterally claim for its own use, the nation's \$1.9 trillion worth of copyrighted work—a full 11.44% of the U.S. economy.³ We further assert that the government is prohibited under the U.S. Constitution from compelling the speech of photographers through the unauthorized use of their images.

³ Stephen E. Siwick, *Copyright Industries in the U.S. Economy: The 2014 Report*, INTERN'L INTELL. PROP. ALLIANCE (Dec. 2014), https://www.riaa.com/wp-content/uploads/2015/09/2014_CopyrightIndustries_USReport.pdf.

A. The University's assertion in its Plea to the Jurisdiction that a photographer has no remedy when his work is misappropriated by a state actor is a position that shocks the conscience and would devastate the creative industry if adopted by this court.

The depth and breadth of the creative community both in this country and in the state of Texas cannot be overstated. From artists and photographers to musicians and writers, creatives play both a financial and cultural role in society. But it is not only those who are photographers or photojournalists, or even just visual artists that would be harmed by the arguments propounded by the State. Software developers, local television and radio stations, motion picture studios, and music publishers, just to name a few, all call Texas home. These groups rely on copyright laws to protect their intellectual property. Simply put, each of these individuals and companies base their livelihood, in part, on the principles of copyright first articulated in the U.S. Constitution, and later codified into long-standing and well-settled law.⁴ Their efforts, skill, and importance to this state and society should not be discarded.

1. Copyright protections are critical to the State's economy and workforce in disparate mediums and methods.

According to the Texas Cultural Trust's "2019 State of the Arts Report," the arts and creative communities generate \$5.59 billion each year in Texas.⁵ The creative sector in this state employs 1-in-15 Texans, more than 800,000 individuals.⁶

⁴ See U.S. CONST. ART. I § 8; 17 U.S.C. § 102.

⁵ 2019 State of the Arts Report, TEXAS CULTURAL TRUST (2019) available at <http://txculturaltrust.org/wp-content/uploads/2019/02/658131-Texas-Cultural-v2-Pages.pdf> at 5.

⁶ *Id.*

These are not small numbers. One of the creative crown jewels of Texas is Houston—the most populous city in Texas and the fourth largest city in the nation. Here, photographers and other creative authors comprise over 8% of the entire workforce, and close to 30% of the state’s creative population.⁷

Intellectual property as a whole, and specifically copyright, touches an even larger part of the state’s economy. According to the Copyright Alliance, the universe of copyright-holding companies in Texas includes 22,010 music publishers, 783 local commercial radio stations, and 118 local commercial television stations, just to list a few of the major categories.⁸ Taking the groups listed above, and adding the impact of the local software industry (which by itself employs over 385,000 people), the economic impact of copyright in the state of Texas is approximately \$152 billion.⁹

The aim of copyright law is to balance two competing interests: the rights of the creator to enjoy the products of their labors, and the enhancement of the public good.¹⁰ Here, the State has argued that there should be no balance at all; stealing property is fine, as long as it is for the benefit of the State. If this argument, which

⁷ *Id.* at 13.

⁸ *Copyright Facts for the State of Texas*, COPYRIGHT ALLIANCE (Jul. 2018), <https://copyrightalliance.org/wp-content/uploads/2018/07/Texas.pdf>.

⁹ *Id.*

¹⁰ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (“this task involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society’s competing interest in the free flow of ideas, information, and commerce on the other hand”).

shocks the conscience, were to be adopted, the community of creators—ranging from individuals like the Appellee, actor Steve Martin, singer Kelly Clarkson, and film-maker Wes Anderson to companies such as iHeartMedia Inc. and GameStop—all Texas-based individuals and entities—would be irreparably harmed.¹¹

2. The Attorney General’s argument would create a free collective license for all state entities to use copyrighted works without compensation. This position is pre-empted by the federal government’s exclusive control over copyright law.

Amici are dumbfounded and disconcerted as to why the Attorney General is taking a position that would cause irreparable harm to the tens of thousands of photographers, graphic designers, musicians, authors, and publishers who operate as small businesses in the State of Texas, or the hundreds of thousands of creative professionals in the United States that would be impacted by the State’s position. The outcome of the Attorney General’s position in arguing that state entities should not be required to seek permission or pay to license the use of copyrighted work would create a system of free compulsory licensing of copyrighted works by those same state actors. While compulsory collective licensing schemes like this exist in other countries via reprographic rights organizations (“RRO’s”), which establish set fees for various entities such as schools and governments,¹² these RRO’s do not grant

¹¹ *Copyright Facts for the State of Texas*, COPYRIGHT ALLIANCE (Jul. 2018), <https://copyrightalliance.org/wp-content/uploads/2018/07/Texas.pdf>.

¹² *See, e.g., Digital Business Models*, INT’L FED. OF REPROD. RIGHTS ORGS. 8–12, http://www.ifro.org/sites/default/files/ifro_brochure_web.pdf (outlining the general terms of various collective licensing systems for digital uses of copyright works in certain countries)

free usage. Rather, they have set, negotiated fees which the government entities pay for the use. Regardless, the U.S. does not have a such a system, and it is certainly not appropriate for the Texas Attorney General—or Texas courts—to preempt federal law and Congressional authority by creating a *free* collective licensing system that inures solely to the State’s own benefit.¹³

B. The University’s Argument that it didn’t “know” the image was copyrighted falls flat—all contemporary images are presumed copyrighted.

The University fails to escape its obligation to comply with copyright laws when it argues that a photographer must allege that an infringing state actor “knew that the image was copyrighted” and goes so far as to state that “the University did not know its actions were ‘certain to result’ in copyright infringement.”¹⁴ It is inconsistent with copyright law to assert that an infringer is absolved of fault because they “did not know” they were infringing on someone’s rights. This notion was summarily disposed of just last month by the United States Court of Appeals for the Fourth Circuit which addressed a similar defense—that the infringer acted in “good faith” when stealing an image. The Fourth Circuit rejected that proposition, holding that “all contemporary photographs are presumptively under copyright.”¹⁵ The

¹³ U.S. CONST. ART. VI cl. 2.

¹⁴ See Appellant Br. at 19–22. Incredibly, in the same breath, the University admits that part of the allegation is that it “removed identifying material from the image.” Appellant Br. at 21. While removal of copyright management information is not required for a finding of willful copyright infringement, it certainly provides further evidence of willfulness.

¹⁵ *Brammer v. Violent Hues Productions, LLC*, 18-1763, 2019 WL 1867833, at *6 (4th Cir. 2019).

Brammer court further noted that “[a]s a basic matter, copyright infringement is a strict liability offense, in which a violation does not require a culpable state of mind.”¹⁶

Simply put, copyright in images and other creative works vests in the creator the moment the work is created, and it endures until 70 years after the death of the author.¹⁷ Apart from works in the public domain, any photo that has been taken in recent decades is a copyrighted work.¹⁸

Those who choose to publish photographs in a manner that impacts the bundle of rights reserved by federal law for the photographer have a responsibility to ensure that such use is permissible. Indeed, the Fifth Circuit considers it “willful” if a defendant “has recklessly disregarded the [copyright], or upon a showing that the defendant knew or should have known it infringed upon a copyrighted work.”¹⁹ Other circuits agree that “a party [] act[s] recklessly by refusing, as a matter of policy, to even investigate or attempt to determine whether particular [works] are subject to copyright protections.”²⁰ And knowledge that a use is infringing “need not

¹⁶ *Id.* at *5.

¹⁷ See 17 U.S.C. § 102(a)(5) (vesting copyright in pictorial works); 17 U.S.C. § 302 (copyright endures until 70 years after the death of the author).

¹⁸ *Golan v. Holder*, 565 U.S. 302, 309 (2012) (explaining while copyright protection at one time hinged on compliance with notice, registration, and renewal requirements, the U.S. removed those formalities to join the Berne Convention in 1989).

¹⁹ *Lance v. Freddie Records, Inc.*, 986 F.2d 1419 (5th Cir. 1993).

²⁰ *Unicolors, Inc. v. Urban Outfitters, Inc.*, 853 F.3d 980, 992 (9th Cir. 2017); *Friedman v. Live Nation Merch., Inc.*, 833 F.3d 1180, 1186 (9th Cir. 2016) (failing to explicitly inquire or seek information about the copyright status of a work amounts to “recklessness or willful disregard, and thus willfulness.”); *BMG Rights Mgmt. (US) LLC v. Cox Commc’n Inc.*, 881 F.3d 293, 312 (4th

be proven directly but may be inferred from the defendant's conduct.”²¹ Thus, contrary to the University’s position that its failure to investigate the copyright shields it from liability, failure to exercise due diligence or investigate the copyright status of a work supports a finding of willfulness, resulting in enhanced statutory penalties.²²

C. The University’s “public use” of the copyrighted work also “damaged” the copyright in the work.

The plain language of the Texas Takings Clause states, “No person’s property shall be taken, *damaged*, or destroyed for *or applied to public use* without adequate compensation being made...”²³ Likewise, the Fifth Amendment of the United States Constitution forbids the taking of “private property [] for *public use*, without just compensation”²⁴ which includes a requirement that the government compensate a property owner when property is damaged.²⁵ It seems without question that the University took the intellectual property of the photographer—a.k.a. the copyrighted work—for public use without compensation. But the use also damaged the value of the copyright in the photograph.

Cir. 2018) (“copyright infringement is willful if the defendant recklessly disregards a copyright holder’s rights”).

²¹ *N.A.S. Imp., Corp. v. Chenson Enterprises, Inc.*, 968 F.2d 250, 252 (2d Cir. 1992).

²² *Id.*

²³ TEX. CONST. ART. I, § 17 (emphasis added).

²⁴ U.S. CONST. AMEND. V (emphasis added).

²⁵ *See Banks v. United States*, 88 Fed. Cl. 665, 683 (2009) (government action that caused erosion to property entitled property owner to lost property as well as “the reasonably foreseeable future loss to their property”).

1. The University's infringement damaged the value of the copyright and the ability to license the photograph exclusively.

The University's argument that a taking has not occurred because the photographer maintains some parts of the "bundle of rights" under copyright ignores the damage the use has done to the value of the copyright. It further ignores the detrimental impact such a taking has on the image's market value—whereby a client is less likely to license an image when another party, competitor or not, is using the same image. That use of the image dilutes and damages the future value of the image.²⁶

Further, the dynamics of photography licensing are not as simple as the University's position suggests, and licensing of photographs often involves exclusivity within a certain market.²⁷ The Attorney General's argument treats images as if they are all licensed in the market as "Royalty-Free," meaning that users pay a flat fee and have a broad license to use the images for a wide variety of purposes, but have no control over how others use the image in a way that might damage their business interests.²⁸ In reality the vast majority of photographers license their work on a "Rights-Managed" basis. Through rights-managed image licensing, the clients

²⁶ Nancy E. Wolff, *Enforcing Copyright: Dissecting the Infringement Case*, in PROF'L BUS. PRACTICES IN PHOTOGRAPHY 70, 78 (7th ed., 2008).

²⁷ Susan Carr, *Understanding Licensing – The Key to Being a Professional Photographer*, in PROF'L BUS. PRACTICES IN PHOTOGRAPHY 3 (7th ed., 2008).

²⁸ *What are Royalty Free Images? Best Guides to use Royalty Free Photos!*, STOCK PHOTO GUIDES (Jun. 16, 2016), <https://www.stockphotoguides.com/use/royalty-free/what-are-royalty-free-images>

of professional photographers often have exclusive control of an image in a certain market.²⁹ For example, if Rice University wanted to license Mr. Olive’s photograph, they would ask for exclusivity in the market of similar businesses, and possibly even universities in Houston or Texas. If a business that had properly licensed an image saw that same image on a competitors website, they would have a valid argument that they did not receive the exclusivity that they paid for.³⁰ In addition, a potential client would be unlikely to license an image that their competitor was already using.³¹ In that way, the University did not just take Olive’s photograph to use for themselves without compensating him, they also took Olive’s ability to license his image to another university or school willing to pay for its use.

2. Endorsing unchecked copyright infringement by state entities would give them a competitive advantage, thus harming businesses that compete with the State.

²⁹ See, e.g., *Rights-Managed Images, Excellence, Exclusivity and Control*, GETTY IMAGES, <https://www.gettyimages.com/creative-images/rightsmanaged> (last viewed May 8, 2019).

³⁰ See *Copyright Alternative in Small Claims Enforcement Act of 2017, H.R. 3945: Hearing Before the House Comm. On the Judiciary*, 115th Cong. (2018) (Statement of Jenna Close, Commercial Photographer), avail. at <https://www.youtube.com/watch?v=GuiQUasmxno>. See also, *Former National Board Chair Close Urges House Judiciary Committee to Enact CASE Act*, AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS (Sept. 27, 2018), <https://www.asmp.org/advocacy/former-asmp-national-board-chair-close-urges-house-judiciary-committee-to-enact-case-act/>; Jenna Close, *Advocacy is a Verb: My Testimony on The Hill*, AMERICAN SOCIETY OF MEDIA PHOTOGRAPHERS (Oct. 17, 2018), <https://www.asmp.org/advocacy/advocacy-is-a-verb-my-testimony-on-the-hill/>.

³¹ See *Royalty Free or Rights Managed? Best Comparative Guide*, STOCK PHOTO GUIDES (July 16, 2016), <https://www.stockphotoguides.com/use/royalty-free/royalty-free-or-rights-managed> (“[royalty-free images] are also often in use by different people, companies and brands at the same time”).

The University of Houston, as a state entity that operates in a “proprietary capacity”—that is, for a specific intended purpose—enjoys a certain flexibility that other government enterprises do not, such as the ability to control access and restrict speech in certain places.³² When a government entity operates in a proprietary capacity, as the University does in many ways, that entity should have the same responsibilities under the law that other, similar businesses do.

The Attorney General’s position does not just impact state entities. Businesses that pay to license visual works are unfairly harmed when they have to compete against companies who cheat by stealing images. It is self-evident that the profits of a company that steals images to market itself are higher than those of a company that properly licenses their images because their costs are less. The same would be true if the company stole the widgets they used or refused to pay their workers. Because the state is operating in its “proprietary” capacity, much like a business, it obtains an unfair advantage over its competition by not having to license and pay for the use of an image.

D. There are significant First Amendment concerns in this case.

Not addressed in the briefing of the parties—but of great concern to *amici*—is the fact that the State abridges the First Amendment rights of a photographer when it compels speech through the government’s unauthorized use of an image. A

³²*United States v. Kokinda*, 497 U.S. 720, 725–26 (1990).

photographer's decision about what to say and where to allow their work to be published is protected by the First Amendment. Photography is unquestionably, and unassailably protected First Amendment speech.³³ It is also well-settled that the government cannot compel speech.³⁴ The Attorney General's position would allow the government to communicate its approved message through the misappropriation of copyrighted works by newspapers and television stations, as well as any individual or small business. This would amount to unconstitutional forced speech.

In the seminal U.S. Supreme Court decision *Miami Herald Pub. Co. v. Tornillo*,³⁵ the Supreme Court held that a statute requiring the publication of specific material was invalid—the choice of what to publish and other decisions related to publishing belongs exclusively to the speaker.³⁶ The high court has repeatedly

³³ See, e.g., *Regan v. Time, Inc.*, 468 U.S. 641, 646 (1984) (finding that a statute banning the use of images of currency based on the purpose of the use was an unconstitutional content-based restriction); *Jacobellis v. Ohio*, 378 U.S. 184, 187 (1964) (“Motion pictures are within the ambit of the constitutional guarantees of freedom of speech and of the press.”); *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 938 (6th Cir. 2003) (“The protection of the First Amendment is not limited to written or spoken words, but includes other mediums of expression, including music, pictures, films, photographs, paintings, drawings, engravings, prints, and sculptures.”); *Bery v. City of New York*, 97 F.3d 689, 696 (2d Cir. 1996) (“[P]aintings, photographs, prints and sculptures. . . always communicate some idea or concept to those who view it, and as such are entitled to full First Amendment protection.”).

³⁴ *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241, 258 (1974) (holding that a “compulsion to publish” is inconsistent with the First Amendment); *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 122 (Tex. 2000) (“Libel law cannot require a news organization to air the interviews of everyone who might speak on a public figure's behalf.”).

³⁵ *Miami Herald Pub. Co.*, 418 U.S. at 258.

³⁶ *Id.*; see also, *Levan v. Capital Cities/ABC, Inc.*, 190 F.3d 1230, 1243 (11th Cir. 1999) (“The decision to air the interview of one person but not another is at heart an editorial decision.”); *Passaic Daily News v. N.L.R.B.*, 736 F.2d 1543, 1558 (D.C. Cir. 1984) (“governmental coercion [to publish a column] gives rise to a confrontation with the First Amendment.”); *Baltimore Sun Co. v. State*, 340 Md. 437, 453 (1995) (“a judicial order conditioning access to a juvenile

affirmed that “compelling individuals to speak a particular message, [] alter[s] the content of their speech” and violates their First Amendment rights.³⁷ Under the rule against compelled speech “the speaker has the right to tailor the speech, [which] applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid.”³⁸ Importantly, this rule does not just apply to news organizations and other professional publishers. The protection against compelled speech applies to small and large businesses as well as individuals, and applies regardless of the level of sophistication of their expression.³⁹ The Attorney General’s position would provide the government with limitless use of photographs for the purpose of promoting the government’s message—regardless of whether that message related to a specific government policy, program, or enterprise that the photographer disagreed with. Similarly, to force Photolive and Jim Olive to have his image used without permission, in a manner that promotes the University of Houston violates his First Amendment protections against compelled speech.

proceeding upon the required publication of specific material is unconstitutional to the same extent as an order conditioning access upon a restraint from publication.”).

³⁷ *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018).

³⁸ *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995).

³⁹ *Id.*; see also *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2253 (2015) (“we have recognized that the First Amendment stringently limits a State’s authority to compel a private party to express a view with which the private party disagrees”).

While federal copyright law protects Mr. Olive from having his intellectual property used in a manner he does not choose, such compelled use by the University of Houston is also an affront to his First Amendment rights.

III. CONCLUSION

The creative community is not just comprised of photographers like Mr. Olive; it is not just photojournalists or painters or musicians. This community is a vital part of the state and local economy. Just as important as the damage to this community is the message sent to the public at large undermining the right of creators and the value of their creations.

Here, the State attempts to twist text and hide behind misapplied language to permit a significant injury to a citizen. Theft of intellectual property is just that— theft of property. That the University afforded neither the photographer nor the image any consideration during the three years it was being used for their direct benefit is a clear indication of disdain for the law and the citizenry. The State should not be able to create a—previously unheard of—free, compulsory, collective licensing system that only benefits itself, and couch such a taking in the trappings of sovereign immunity. It is no defense to claim that you didn't know the image you are using is copyrighted. In fact, the opposite is true. Original creations like this photograph are presumed to be copyrighted. The University should have known this from the beginning. It would likely not pass muster with University officials for a

student to claim ignorance as they plagiarized another's writings; why should the law allow them to do the same thing to another author?

It was exactly that public use of the work that damaged the market for the photographer. Commercial photographers like Mr. Olive create works precisely to license the use that the University sought. They license works with parameters on geography, duration, and exclusivity. Of these, it is often exclusivity that garners the greatest guarantee of price. Both copyright protection and a market for his work were taken from Mr. Olive by the State. For this image it is a right that can never be returned. Condoning this type of infringement would allow the State to usurp the market. Every other organization and business must adhere to the longstanding set of rules of paying to license photography, while the State wants to play by another rule, inconsistent with constitutional protections and copyright law.

Between the infringement of Mr. Olive's copyright, the financial and cultural impact on the creative community and society, the devaluation of copyright and intellectual property protections, the use of "ignorance" as a defense, and compelled speech in violation of the First Amendment, the theft of property by the University must be remedied and the arguments of the University must be denied.

PRAYER

For the foregoing reasons and the reasons stated in Olive's brief, the Court should affirm the district court's ruling in favor of Plaintiff-Appellee.

Respectfully submitted,

By: /s/ Alicia Calzada
Alicia Calzada
Deputy General Counsel
National Press Photographers Association

Alicia Wagner Calzada, PLLC
State Bar No. 24076296
221 W. Poplar St.
San Antonio, TX 78212
Telephone: (210) 825-1449
Alicia@calzadalegal.com

By: /s/ Mickey H. Osterreicher
Mickey H. Osterreicher
General Counsel
National Press Photographers Association
120 Hooper Street
Athens, GA 30602
Telephone: (716) 983-7800
lawyer@nppa.org

**ATTORNEYS FOR AMICUS
NATIONAL PRESS
PHOTOGRAPHERS ASSOCIATION**

By: /s/ Thomas Maddrey
Thomas Maddrey
General Counsel
American Society of Media Photographers

Maddrey PLLC
State Bar No. 24092740
901 Main St., Ste. 6530
Dallas, TX 75202
Telephone: (214) 701-1875
tbm@maddreypllc.com

**ATTORNEY FOR AMICUS
AMERICAN SOCIETY OF MEDIA
PHOTOGRAPHERS**

CERTIFICATE OF COMPLIANCE WITH RULE 9.4(e)

1. This brief complies with the type-volume limitation of Texas Rule of Appellate Procedure 9.4(e)(i)(2)(B) because, according to the word count on Microsoft Word for Mac, it contains 6,162 words, excluding the parts of the brief exempted by Texas Rule of Appellate Procedure 9.4(e)(i)(1).
2. This brief complies with the typeface requirements of Texas Rule of Appellate Procedure 9.4(e) because it has been prepared in a proportionally spaced typeface using Microsoft Word software in Times New Roman 14-point font in text and Times New Roman 12-point font in footnotes.

/s/ *Alicia Calzada*

Alicia Calzada

CERTIFICATE OF SERVICE

The above signed certifies that on May 15, 2019 a true and correct copy of the foregoing was served electronically on all counsel of record using the Court's electronic filing manager.

/s/ Alicia Calzada

Alicia Calzada